IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| NICHOLAS POLLETTA,<br>Plaintiff,<br>v.<br>THOMAS DART, Sheriff of Cook County; and COOK COUNTY, ILLINOIS,<br>Defendants. | Docket No. 16 C 9492 |
| GERALD HACKER,<br>Plaintiff,<br>v.<br>THOMAS DART; COOK COUNTY, ILLINOIS; SABRINA RIVERO-CANCHOLA; D. SANDOVAL,<br>Defendants. | Docket No. 17 C 4282<br>Chicago, Illinois<br>July 5, 2018<br>2:00 o'clock p.m. |

TRANSCRIPT OF PROCEEDINGS - MOTION
BEFORE THE HONORABLE JOHN Z. LEE

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(Proceedings had in open court:)

THE CLERK: 16 CV 9492, Polletta v. Dart. And 17 CV 4282, Hacker v. Dart.

MR. T. MORRISSEY: Good afternoon, your Honor. Thomas Morrissey on behalf of Mr. Polletta and Mr. Hacker in the Hacker versus Dart case.

MR. P. MORRISSEY: Good morning. Patrick Morrissey on behalf of the plaintiffs.

MS. SANCHEZ: Good afternoon, your Honor. Yifan Sanchez, special assistant state's attorney, for the sheriff and individual sheriff defendants.

MS. SCHELLER: Good afternoon, your Honor. Assistant State's Attorney Jessica Scheller appearing on behalf of Cook-County in both matters.

THE COURT: All right. This is oral argument with regard to the motion for class certification in the two matters. First of all, we'll deal with the Hacker case. Okay? And I will hear from the plaintiffs first, and defense counsel can take a seat, if you like.

I like the fact that you are all sitting in one table. That shows good solidarity.

All right. Mr. Morrissey, at the last status hearing I voiced some concerns and raised some issues. We can start with those. Or you can go ahead and start wherever you like to start.

MR. T. MORRISSEY: Well, perhaps it's best that the Court address the issues that you are concerned with.

THE COURT: So if I understand it, upon entry an individual inmate, if they have a hearing impairment, is designated either as hard of hearing or deaf by the county.

You can have a seat.

MR. T. MORRISSEY: That's correct, your Honor. Do you want us to sit down or stand?

THE COURT: No, no, I was asking defense counsel to have a seat. She was standing up.

And I understand that Mr. Hacker has been designated as being hard of hearing, is that correct?

MR. P. MORRISSEY: He was actually hearing impaired. They don't have a term hard of hearing.

THE COURT: It's called hearing impaired. Okay. So it's either deaf or hearing impaired. Got it.

MR. T. MORRISSEY: The more technical is hearing -- hard of hearing, but the jail uses hearing impaired. But they are the same.

THE COURT: Okay. So the designation that the jail puts on them is hearing impaired.

MR. T. MORRISSEY: That's correct.

THE COURT: All right. So we'll just use that term. Okay?

And Mr. Hacker falls within the hearing impaired

group, and he has some ability to hear, is that correct?

MR. T. MORRISSEY: That's correct, with a listening device.

THE COURT: And so one of the concerns I had was whether or not Mr. Hacker is adequate to represent the interests of those individuals who are designated as deaf as part of this case. And so I guess we can start from there.

MR. T. MORRISSEY: Sure. The case involves a general policy of the jail as it relates to deaf and hard of hearing or hearing impaired prisoners. We learned during the oral arguments in regards to Mr. Hacker's preliminary injunction that auxiliary aids are not provided to deaf and hard of hearing people.

The testimony of the ADA compliance director and the person that was produced under 30(b)(6) is that if a person comes in with a hearing aid or a listening device, they'll allow them to maintain that in the jail. However, and it's very clear in their testimony, that if you don't have those items and you come into the jail -- I think Ms. Rivera said, there is nothing standing in the way of Mr. Hacker going out and purchasing a hearing aid or listening device, but they are not going to provide it.

And so in regards to a deaf person, auxiliary aids for a deaf person might be sign language. We're looking at the regulations in this case, your Honor. And under the ADA -- and

I believe the regulation is 130(b)(2). And we addressed that -- the Court addressed that in granting a preliminary injunction.

THE COURT: I guess, Mr. Morrissey, I understand that from your perspective, you are attacking the same policy or absence of policy or the failure to abide by current policy with regard to the class.

But if you think about it in terms of what relief would be adequate for the class, say with regard to the injunctive class, or think about it in terms of the damages class, kind of what relief would be -- would adequately remedy the injuries of the class, they would all be different, right?

And so, for example, if the jail decided, okay, well, so now what we're going to do is, we're going to provide the class as you have defined it with an auxiliary hearing aid, the type of which Mr. Hacker has, an ALD that he could put to his ear so he could hear things that he cannot otherwise hear. That wouldn't help someone who's deaf at all, right?

And so if you think in terms of the interests that Mr. Hacker is trying to represent, and also think about it in terms of, right -- when I think about cases like this and I think about adequacy and typicality, I also think about a hypothetical settlement negotiation, where Mr. Hacker is participating in a settlement in the case, and where he might be incentivized to agree to a certain level of auxiliary aid

assistance that would not provide people who are deaf with the remedy or doesn't -- to address their particular injury.

And so that's where I have difficulty understanding how Mr. Hacker could adequately represent the class. I understand that he and other members of the class are attacking the fact that the jail is not providing anyone anything. I get that.

MR. T. MORRISSEY: Correct.

THE COURT: But when you start kind of breaking down kind of what does that mean for this litigation going forward, and what kind of remedy can be provided, and particularly as I said if there are ongoing settlement discussions, you know, what interest Mr. Hacker can defend, or whether he would be incentivized to trade off certain rights to gain other rights, that's where it appears to me that one begins to kind of see the potential conflict between someone like Mr. Hacker, who is hearing impaired, versus someone who may be deaf and require a different type or additional type, more resource-intensive assistance.

MR. T. MORRISSEY: Well, I think we are looking at two different forms of relief. On the one hand you are addressing injunctive, (b)(2). And then there is the (b)(3) relief. If we talked about it in terms of (b)(3), cases involving jail policies are typically -- are generally certified under (b)(3), when you have a general policy.

In this case, across the board situation where arguably, according to us, they're not following 130 -- 35.160(b), in that they are not furnishing auxiliary aids. So deaf and hard of the hearing or hearing impaired people can participate or have the benefit of services and programs.

So if we look at it under (b)(3), there is a whole host of cases that the Court even cited in your Parish opinion, Jackson versus Dart, Otero, which was Judge St. Eve's case involving prisoners who were brought back after they were discharged by a Judge, brought back to the jail with other prisoners that had to remain in the jail.

And this Court and other Courts have said that under (b)(3), those issues, individualized issues, such as causation, can be dealt with separately in proceedings after there is a decision whether or not there is illegal conduct by the government.

So here we are specifically saying that what the jail is doing is illegal under to the regulation that requires them to furnish auxiliary aids. So under (b)(3), I don't think there will be a concern for the Court.

THE COURT: What about people who bring their own ALDs and are allowed to bring their own ALDs? Would they be then not part of that class?

MR. T. MORRISSEY: They -- they have -- they don't have a claim because they have been provided, they have been

furnished, an accommodation. So they wouldn't be -- fall within the class definition arguably.

THE COURT: Okay. So if they brought --

MR. T. MORRISSEY: And in that case, your Honor, there is testimony from -- under 30(b)(6), Ms. Rivera, that there was only one person that was allowed to bring in an ALD.

THE COURT: Okay. So for people that -- for inmates that were allowed to bring in their own ALD, those people would not be part of the class as you envision it.

MR. T. MORRISSEY: Correct, because they were provided an --

MR. P. MORRISSEY: Your Honor, there is also this component of a TTY access. And TTY access is -- covers both deaf people and hearing impaired.

THE COURT: Right. But this is -- but, Mr. Morrissey, what you bring up is just another complication in defining a class so broadly, right? Then you have people like Mr. Hacker who wasn't provided an ALD or TTY. And then you have people who were allowed to bring their own ALD who weren't given a TTY.

And by the way, I don't know whether if you have an ALD whether you need a TTY or not. Would you?

MR. T. MORRISSEY: You would.

THE COURT: So you can't use an ALD to listen to phone calls?

MR. P. MORRISSEY: Not from my understanding, because you have -- Mr. Hacker always used a TTY. It was -- from my observation, interaction with Mr. Hacker, I don't believe -- it's like a microphone, your Honor, that is directed towards the sound.

And I don't believe, based on the jail's phones that they have in the dayroom, that it's feasible to pick up the audio from using the assistive listening device.

MR. T. MORRISSEY: Our definition, your Honor, says they require -- they require an accommodation. In your case, if a person had an ALD, let's assume for argument's sake with that ALD they could use the telephone without any other assistance, any other auxiliary help, then they wouldn't be somebody that would fit within the class definition because they don't require an accommodation. It's only people that need an accommodation that would fall within the class definition.

THE COURT: So when you say -- for your class definition when you say, require, you don't mean legally require. You mean that they need it to carry out -- to enjoy the services provided by the facility.

MR. T. MORRISSEY: Correct. And the regulations talk about the type of accommodation is -- is a matter of personal preference. And the public entity is supposed to try to accommodate that, use the accommodation the person needs.

THE COURT: Okay. What about the injunctive relief class then? With regard to the injunctive relief class, would there be issues about typicality and commonality as to the injunctive class?

MR. T. MORRISSEY: No, no.

THE COURT: What would I order? What would the injunction be that you are requesting, that they just follow the procedures with everyone?

MR. T. MORRISSEY: Well, Judge, can I step back a minute and give you a little historical perspective on this case?

We talked about the general order many times in this case. And the general order, as we kind of noted, tracks the regulations. But if we step back a little further, why did the sheriff come up with this general order and not follow it?

What happened in 2012 -- and this just recently came out in the deposition of the former executive director of the jail. In 2012, the United States Justice Department stepped in. And they saw a letter to the sheriff, and they said, hey, you're not following -- you're not accommodating people with disabilities at the jail. And part of the people that aren't being accommodated are people that are having trouble communicating.

So over a couple year period, the jail and the justice department lawyers conversed, and they looked at different

aspects. And they signed an agreement in 2015. And I'd like to provide a copy to the Court and to opposing counsel.

(Brief pause.)

MR. T. MORRISSEY: And I'll hand it up to the Court. Unfortunately I only have three copies. But it's page 3 of the implementation plan, your Honor.

And under the caption where it says, communications, it talks about the sheriff addressing this by issuing the general order that we've all seen, General Order 24.

And below that, your Honor, it talks specifically what the general order addresses, including such -- it's -- including such issues as being provided the auxiliary aid of your choice for religious services, having it for disciplinary hearings, for very significant situations at the jail.

So the sheriff was on notice. They drafted that general order. And unfortunately, your Honor, they didn't follow it. So from our evidence, your Honor, is the fact that they -- the justice department tried to fix it. They made a very specific order. And the sheriff came in, and they drafted the general order.

They didn't fix it. So under Rule 20 -- under (b)(2), your Honor, we're asking this Court just to have them fix it, fix it, based upon compliance with what they promised the United States government, and what they promised in their general order, your Honor: Provide these general auxiliary

aids so that people that are deaf and hard of hearing can communicate during significant proceedings.

It's our position that under (b)(2), if they followed the sheriff's own general order, and the Court ordered them to do such, that would resolve the general common issue in this case that they are not furnishing auxiliary aids as required by the regulations to deaf and hard of hearing people.

In regards to whether Mr. Hacker is an appropriate class rep, adequate to represent people that are deaf, I don't know if the Court recalls. But back in the fall of 2017, we filed a case, Reyes versus Dart, involving Mr. Reyes. Mr. Reyes' case is pending before Judge Feinerman. We asked it to be made related here. Mr. Reyes is deaf. And he requires sign language. He also can be assisted with an ALD.

When we -- the Court denied the relatedness motion, we then proceeded in front of Judge Feinerman. We got somewhat identical rulings on preliminary injunction. For one, Mr. Reyes also, same common issue, was not being provided a TTY communication at all. He had been in there for six or eight months without being able to make a phone call to his family. Judge Feinerman -- and they agreed eventually to provide him with TTY access on a daily basis.

We also note in Reyes and in this case, sheriff has a policy that even when they provide it, they don't provide it on weekends. They don't provide it when the correctional

rehabilitation worker isn't present. These are common issues that can be addressed in one ruling by a Court.

In addition, Mr. Reyes had the problem -- has the problem -- had the problem in regards to having the ability to talk to his sister, who came frequently to see him. And for the first eight months he couldn't communicate with his sister.

Finally when he was given -- ordered by -- when they were ordered by the court to provide an ALD for family visits, now he can visit with his family.

The other -- the other matter, your Honor, was the fact that there are all kinds of programs and services provided for inmates at the jail. Mr. Reyes is a very religious person. He wasn't allowed to go to Hispanic Christian services, which are conducted once or twice a week. Now, he was allowed to go to them, your Honor. But he wasn't able to benefit from the Christian services.

Also he wanted to take part in -- in treatment for his alcohol. And they have a program, what is it, the Alcohol Anonymous, that's at the jail in division -- he was in Division 10. He couldn't really benefit from those meetings.

And so we brought a preliminary injunction motion in front of Judge Feinerman, and we got the listening device. So when he attends religious services and when he goes to these meetings once or twice a week, he can participate.

But it shouldn't be necessary, your Honor, that --

we're dealing with a group of people, your Honor, that don't have ready access to lawyers. They're confined. But we know from the medical providers at the jail, we're dealing with at least over 35 or 40 deaf people. In fact, that's a staggered amount. It keeps increasing because obviously the population is fluid.

We also know that hearing impaired is significant, well over the mandated 40. And I think we pointed out 60 or 65 back -- back in October.

So should every person who wants to make a phone call or have a TTY phone call with a family member have to bring their own lawsuit, find a lawyer that will take the case and do it? Should every person who wants to meet with their family members have to file a lawsuit? Should the -- the ability to benefit from programs and services like religion and -- and alcohol treatment, should that be dependent upon the ability to hire a lawyer, bring a separate lawsuit? I don't think so.

And that's why I think it really -- I understand that there are variances, your Honor. But we have here a general order. We have the federal government trying to address it in an implementation plan. If we had an order, I think one order from the Court, assuming you're able to find that the jail was -- conduct was illegal under the ADA -- if we had one order, your Honor, that said, I'm ordering you to comply with the general order of the sheriff, that would be sufficient for

(b)(2).

And it wouldn't involve whether or not any issue -- whether Mr. Hacker's situation varied from Mr. Reyes' or somebody else.

THE COURT: Because you're saying, what's common in all these situations is that the jail is just not following the general order?

MR. T. MORRISSEY: That's correct, your Honor. And the general order tracks the ADA regulations. And it was provided to the justice department as their -- their method to comply with the ADA regulations.

THE COURT: All right. Thank you, Mr. Morrissey.

I will hear from defendants?

MS. SCHELLER: Good afternoon again, your Honor. Jessica Scheller on behalf of Cook County.

Would you like for us to respond to plaintiff? Or do you have specific questions?

THE COURT: No, please start by responding.

MS. SCHELLER: I like to take up first the very last thing that counsel argued with regard to evidence that the jail or the county medical staff were not following the policy. And that simply is not borne out by any of the briefing, the motion for class certification or discovery in this case.

When we began this case and when plaintiff first obtained the preliminary injunctions, that was well before much

of the discovery had been completed. What discovery has borne out is that Mr. Hacker's disability is accommodated. Medical staff speaks into his ear of preference, where he has the greatest hearing. The medical records reflect that he repeats back to them his course of care, and that communication is effective and it's done according to his preferences.

So I think there is something of a dearth of evidence to support plaintiff's premise that the jail and medical staff aren't following the ADA or the terms of the general order.

The second thing I like to raise is that I question the validity of plaintiff's attempt to assert privileges under the DOJ supervision of Cook County's medical staff and the jail's staff because I don't believe it gives rise to a private right of action. And I think that's been pretty well decided well and over in the last few years in this -- in this jurisdiction.

But beyond that, in going to the heart of what the Court was asking plaintiff about, which is, is Mr. Hacker a typical class representative? Is his experience common? And this will all be borne out on summary judgment, but the answer to that question is, no.

The medical providers who have treated him, and specifically the ENT who treated him from Stroger on an audiology consult, testified that while he is hearing impaired, he would not benefit at all from an assistive listening device

based upon the nature of his hearing loss, which is, he has a hearing loss which has some differentiation issues, meaning he hears Charley Brown's mom. He can't hear the consonants or the vowels. And thus, providing him with an assistive listening device just to make that particular sound amplified would be of zero benefit to Mr. Hacker.

So I don't think that his experience is common or typical. And I think that that is borne out by the record in this case.

The other issue I like to raise is that the plaintiffs --

THE COURT: It's borne out by the record, but -- it may be borne out by the record. But that wasn't part of the briefing, right?

MS. SCHELLER: Correct, your Honor. That deposition happened at the close of fact discovery toward the end of May or early June. And to the extent the Court would like to review it, I'd be happy to submit it in camera. It is a medical deposition, so it may not be appropriate for general filing.

The other issue that I'd like to raise, and I think that this is an issue that makes this case a little bit difficult to litigate. And that is that plaintiff's counsel is the architect of their own lawsuit. They could have added as many class representatives as they saw fit at the -- at the

outset of this litigation.

But the reality is, Mr. Reyes is not a plaintiff in this case. He is a plaintiff in another case, of which I am not counsel of record. I don't know the facts. I have no idea what happened in that case, which accommodations have been requested, granted, denied or otherwise.

And so we are a little late in the game at the close of fact discovery to talk about another potential plaintiff in this case, when the plaintiffs represent both of these individuals and they have from the inception of both pieces of litigation. And it's -- it's difficult as it -- as a defense attorney to understand really where the ball is.

If plaintiffs wanted to add a class representative or potential class representative who is deaf as opposed to hearing impaired, they had the opportunity to do that and elected not to do so. It's difficult at this point to fathom how we could factor in this other case in this litigation when we've concluded discovery.

So I would suggest that it's not really appropriate to relate the cases or add plaintiffs at this point. And I would just reiterate that I don't really believe that Mr. Hacker is an adequate representative of the class, or that his disability more importantly has not been accommodated.

THE COURT: Well, as I read the general order, the jail has to make reasonable efforts to accommodate Mr. Hacker's

preference, right, with regard to addressing his hearing impairment? And are you saying that his preference -- from what I gather, Mr. Hacker's preference is an -- is to receive an ALD.

MS. SCHELLER: Well, there are two responses to that. I can only answer for the medical staff. I'll defer to the sheriff's counsel for the jail operations.

First, his preference when dealing with medical staff is that he points to one of his ears, and they speak loudly into it. And that is confirmed by all of the testimony in the record, and it's not controverted in any way, shape or form.

The secondary piece is, he could claim a preference of an ALD. But if it provides zero benefit, as is the testimony from the subject matter expert Dr. Caughlin, then how is he being denied an accommodation?

So that would be the secondary argument to that. And I will defer to the sheriff's counsel as to the remainder.

MS. SANCHEZ: Your Honor, I think after the reasons provided by plaintiff's counsel, we can see clearly that the commonality relied upon by the plaintiff is really the violation, alleged violation, of the general orders without the -- distinguishing any individual needs. And I think we have done briefs in this case. I think the law is clear. Commonality is based on the objective standard, not based on subjective standard.

We talk about individual preference. It's really -- it's -- it can be easily manipulated for purposes of litigation. And in example of Mr. Hacker, we -- we didn't know that ALD didn't help him at all. And -- but after the deposition of his treating physician, we now know that his alleged preferred method actually indeed doesn't help at all.

We don't want to get into the motive why he request that. But that's a prime example of how a plaintiff can claim subjectively he's helped by this method to advance litigation.

And I think we are clear that violation of the provision itself is not a common harm or common injury. Still there has to be common injury sustained by the members of the putative members. In this case, we heard plaintiff mention Mr. Hacker, Mr. Reyes. But that's it. That's it. We don't have --

THE COURT: But, counsel, if someone -- when someone is admitted into the jail, it's the facility that designates that person either deaf or hearing impaired. And so by then the facility knows that this person is going to need some sort of assistance in order to hear as compared to -- and to take advantage of all the services that are provided by the prison, or by the jail. And if the jail isn't abiding by its general order, why isn't that enough?

MS. SANCHEZ: Your Honor, the general order that we talk about says, as needed. And so what is as needed?

THE COURT: Right. But the jail has determined that it's needed by designating them as either deaf or hearing impaired, right? And so there is a need. And what plaintiff's theory is that there may be various degrees of need, but that their theory in the case is that none of the needs are being met, not even the most elementary need.

And so if -- and of course, that is their theory. And I recognize that defendants likely disagree with that theory. But if that's their theory of the case and that's their claim, why isn't it enough that someone is designated hard of hearing, hearing impaired, or deaf, and that the jail -- the allegation is the jail just isn't abiding by its general orders?

MS. SANCHEZ: Your Honor, as needed has an individual -- individualized element to it. For example, Mr. Hacker. His need is different from another -- from a deaf person or from another hearing impaired person maybe who -- the person who can hear a little bit.

So in -- I can envision a lot of situations where a detainee might not need ALD. Or I think we have testimony from the ADA coordinator that not every detainee would prefer a TTY because some people don't like to type. They will use the telephone to make calls.

So -- and also we don't know -- when the detainee gets into the jail, we don't know what services or programs they want to participate in. It's really hard to implement or to

foresee. It will put substantial burden on the jail to foresee every inmate comes into the system what programs they are going to taking -- take part in, and to envision or to anticipate the accommodation. As opposed to if you sign up for a program and you request a sign interpreter, or you do so, and you submit a request, but your request is rejected, that might be a different scenario.

However, that's not the class they -- they are trying to certify here. It's a blanket class based on the alert when they -- when they get into jail.

However, we don't know what accommodation is needed for what program and services. There might be different needs for different programs and services. There might -- there might be different levels of accommodation even allowed to accommodate that considering the location, safety to other individuals around. We don't know that yet.

It's -- it's -- without the inmate first show the need for the accommodation and the denial of such, I don't think there is violation of the general order. And certainly not enough for class certification, because we don't have a subject -- we don't have an objective criteria to determine the class members.

What we can see is, if your Honor allows this, there will be a lot of manufactured needs because it's subjective. It's -- if we allow any deaf or hearing impaired detainee to be

class member without the actual needs or failure to accommodate, then a detainee could just join the class and say, hey, now all of a sudden I have a need. I couldn't hear. Or I cannot sign or I cannot write. I am denied TTY use, even though he has never ever used TTY before. He has always used dayroom telephone.

It's -- it's impractical. It's a substantial burden. And it's certainly not the test for class certification. The test again is not a subjective test. It's an objective test. What is the criteria here to identify the members? Is that too broad a class that the plaintiff is trying to certify here?

MS. SCHELLER: Your Honor, if I may add briefly just one thing. The Court mentioned that plaintiffs have an allegation that a whole host of these menus of services are not being provided either by medical staff or the jail.

But I think that brings us back to who has the burden and when. And a class certification, when plaintiffs filed their class certification brief, presumptively under the rules they would have provided the Court with adequate evidence that their theory was borne out by the facts. And I don't believe that that is true here. And I would submit to the Court that it is not the burden of the defendants to refute an allegation. It would be the burden of defendants to refute evidence if presented.

And I think there has been a failing in that regard by

the plaintiffs.

THE COURT: So it seems to me, the problem with not knowing what services an inmate would want to sign up for after they entered the jail is a little overblown because it's hard for me to imagine -- assume that the class is limited to people who are designated as deaf or hearing impaired who need some sort of assistance but aren't provided any. Okay?

It's hard to imagine services or programs provided by the jail that wouldn't require some level of hearing, right? And so it's not like -- I can imagine other programs or other disabilities where that might be true. But here you are talking about just hearing basic instructions and figuring out what the class is about and talking to the counselors or the instructors or the priests or whoever it may be, talking to the guards.

And so if the class is designated as people who haven't received any assistance, right, then it seems that those kind of variances of degree, as I stated previously, wouldn't necessarily defeat the class. Now, the way the class is defined seems to -- seems to be broader than the class that I just suggested.

Mr. Morrissey?

MR. T. MORRISSEY: Yes.

THE COURT: You say that your claim is that members of the class haven't received any assistance pursuant to the

general order. Is that --

MR. T. MORRISSEY: They haven't received any auxiliary aids to communicate or to participate in the programs.

MS. SANCHEZ: Your Honor --

THE COURT: Hold on for a second.

MR. T. MORRISSEY: If I could address some of the issues that they --

THE COURT: No, they are not done yet. I just asked you to address that one issue.

MR. T. MORRISSEY: Sure.

THE COURT: So your class would be those people classified as either deaf or hearing impaired and who need assistance, hearing assistance, including interpreters or other auxiliary aids or services to communicate effectively under access programs, services available to individuals incarcerated by the sheriff, but who were not provided that assistance.

MR. T. MORRISSEY: That would be fine.

THE COURT: Okay. All right. Thank you.

MS. SCHELLER: Your Honor, just in response to that, looking at the record in this case, or even listening to plaintiff's argument in the Reyes case, I don't know that any class member, much less class members numerous enough to warrant certification, have been identified. Persons who have received zero assistance of any kind.

Plaintiff's counsel argued that Mr. Reyes wanted

greater TTY access and is receiving greater TTY access. And the evidence in this case is that Mr. Hacker both has used an assistive listening device with his counsel, and he has used it at other times. I believe Mr. Patrick Morrissey argued in his opening argument that he has been around Mr. Hacker when using an assistive listening device.

So if we are going with a class definition where we're talking about hearing impaired persons or deaf persons who have not received any accommodations or assistance under the general order, I don't believe that a singular class member has been identified, much less enough to warrant a class certification.

MS. SANCHEZ: And, your Honor, and Mr. Hacker also attended a WestCare program. He received assistant listening device at that program, at that -- it was established.

THE COURT: So is it defendants' position that you are complying with the general order?

MS. SANCHEZ: Your Honor, as needed. If you attend a program and you request so, if you need assistant listening device, and you make that accommodation request, I think the ADA coordinator -- she testified that she will consider that. And, however, Mr. Hacker's case it's now known, except litigation and Mr. Hacker's attorney made the request for ALD device for meetings with attorney.

I think we went through with the briefing on the legal issues as -- as to whether that's a program, services provided

by jail. However, when Mr. Hacker attended WestCare, and we presented evidence to the ADA coordinator, coordinator reach out to other personnel at jail and the judge's chamber to get the device to Mr. Hacker. So his need was accommodated for WestCare.

MS. SCHELLER: Your Honor, on behalf of the medical staff, the general order, of course, applies to the sheriff. It is our position and we will argue that his hearing impairment has been accommodated and accommodated in the manner of his preference. It would make no sense to make available to him ASL video interpreting, which is available if needed, because Mr. Hacker does not communicate via ASL.

So if his preference is to have someone speak into his ear, that's what the medical staff have carried out. And we do believe that it is a potential basis for summary judgment.

So in the long answer, yes, we do believe we complied. And, no, Cook County is not the same as the sheriff's staff with regard to general order.

THE COURT: Okay. Thank you.

MS. SCHELLER: Thank you.

THE COURT: So, Mr. Morrissey, as you can tell, I am struggling with the definition, the class definition, that you provided in your original motion. Basically the gist of your suit is that we have people that defendants have designated as deaf or hearing impaired, and they are supposed to follow this

general order, and they are just not following it with regard to the class. That's basically your case.

MR. T. MORRISSEY: And the general order tracks the --

THE COURT: All right. And so --

MR. T. MORRISSEY: -- ADA regulations.

THE COURT: And so by not following the general order, they are violating the ADA.

MR. T. MORRISSEY: Correct.

THE COURT: Okay. And just so because Mr. Hacker was provided an assisted listening device for one program doesn't necessarily mean that they are complying with the order because the order requires them to do it whenever he is participating in any program.

MR. T. MORRISSEY: Correct. But the time that he was provided the ALD was for a previous incarceration. And when he came in in May of 2017, he filed a grievance. And he says, since my arrival at the CCDOC, I have not been provided with an available hearing device to account for my disability under the ADA.

And the response, consistent with we believe the policy is, by Ms. Rivera: The ADA does not require us to provide you with a personal use device. And we maintain that under the ADA that they have to furnish it.

Just to digress for a few moments, Mr. Hacker was deposed using an ALD for about five hours. He was able to

respond to the state's attorney's questions.

When he went and was seen at -- by the ENTs at Stroger, the doctors there referred him for a hearing aid. The person that Ms. Scheller is referring to is a attending doctor that never treated Mr. Hacker. So he has no personal knowledge of Mr. Hacker's hearing deficiency.

You are correct. We want to address those individuals that are classified and diagnosed by medical providers at the jail that on request that they be provided with the auxiliary aid of their choice. And I think it's significant, your Honor, that the ADA director, pursuant to the sheriff's general order and policies, gets notified right when a person is classified by the medical staff that the person is hearing impaired or deaf. And I believe that she then has the ability to reach out to those people, find out what their auxiliary aid they may need, and coordinate that service when -- when there are specific programs and services that the person needs an auxiliary aid for.

So I don't think it's that complex an issue.

THE COURT: Okay. So with regard to the Hacker case, Mr. Morrissey, it's apparent that there was a lot of discovery that was done after the initial motion was filed and as the briefing was being conducted. And I have -- I think I would benefit a lot from an exposition of what was discovered during discovery with regard to how these people not only were -- how

these people were designated, but also how they were treated. Okay? And you seem to have more details about kind of what has been going on.

I have also given you my concerns with regard to the breadth and some of the language of the class that you are proposing in this case. I think that if what you are alleging is basically -- if the case comes down to the class consists of people who need assistance hearing -- and it doesn't really matter whether they are deaf or hearing impaired. You know, they both, both classes, need assistance hearing. And that they are just not being provided that assistance as required by the general order, right?

And by not complying with the general order, that that means that the defendants aren't complying with the ADA, I can see how a class like that could be certified given -- but what I am concerned about is that the case not have to go, at least for liability purposes, into the various gradations of the need or of the remedy that can be provided, because I think that does -- if defendants aptly argue, that does go into issues about typicality and commonality.

Yes, go ahead.

MR. T. MORRISSEY: I don't agree as far as the (b)(3).

THE COURT: But certainly with regard to the (b)(2).

MR. T. MORRISSEY: The (b)(2) it's not necessary to go into individual factors, nor do I believe that for a (b)(3) in

regards to a -- if the Court did find -- I mean, we're not talking about a merits determination at this point, whether or not their -- their actions are illegal or not complying with the ADA. All we're saying is, there is this common claim that they are not furnishing these services.

So whether or not defense counsel is correct that they provide it routinely, which I don't think so, that's something that can be decided on summary judgment.

In regards to the (b)(3), this is a scenario that's so common with jail policies, litigation. There are going to be nuances. Some folks arguably will not be injured, whereas other people will be injured. There might be causation for some folks; no causation for others.

The Seventh Circuit has dealt with that in the Pella versus Saltzman case, which we cited in our brief. The Court cited it in the Parish decertification ruling. And so issues of proximate cause and damages can be addressed separately.

And that's been the case in numerous cases that I've litigated before various judges, the Jackson case, the Smentek case. The Zaborowski, a number of these jailhouse cases, your Honor. Those issues -- and just like the Arreola case that the Seventh Circuit dealt with ten or 15 years ago with canes and crutches, those are issues that can be best addressed separately from liability.

THE COURT: All right. I don't know if I agree with

that. But what I'd like -- but here is how I'd like to proceed. Given the concerns that I have raised and the additional facts that are in the record, Mr. Morrissey, I would like plaintiff to submit a renewed motion for class certification. Okay? And so I am going to deny the prior one without prejudice. And I am going to have you submit a renewed one that kind of deals with these issues as well as kind of provides me a greater factual record. And then I will take another look at it.

So when can you -- how much time do you need to get that together? I see, Mr. Morrissey Junior, he is looking at you. So --

MR. T. MORRISSEY: I think 14 days.

I must say, your Honor, most of the things that we -- we'll fine-tune it a bit. But we don't have the names of the deaf and hard of hearing people that are currently incarcerated and the different nuances. But we can fine-tune our motion, fine-tune the class definition to address the Court's concern about (b)(2), and --

THE COURT: I think --

MR. T. MORRISSEY: Some will be a rehash.

THE COURT: No, I understand.

I think you also need to -- it will be helpful for you to clearly state kind of what your claim is and how you intend to prove it, and then what the remedy is that you are seeking.

Okay? I think that would all be helpful. And as I said, I am interested to see kind of what was uncovered during discovery with regard to these issues.

So, Mr. Morrissey, I will be more charitable than Morrissey Senior, and I will give you 21 days for that. Okay?

And how much time do defendants need to respond?

MS. SANCHEZ: Twenty-eight days, your Honor.

THE COURT: Twenty-eight? Okay. That's fine. That would bring us to August 23.

And is 14 days sufficient for reply?

MR. P. MORRISSEY: That's fine.

THE COURT: Fourteen days for reply, September 6. All right.

So now let's turn to Polletta. So here is -- Polletta, I think, Mr. Morrissey, for plaintiffs is a much harder case, right? And it starts with the question of what is it -- so you have a class, and they all have various accommodations already with regard to their ability to walk and move around.

And so the question is, what practically speaking are you asking for with regard to the Leighton court ramp?

MR. T. MORRISSEY: Very simply, your Honor. Basically the same relief that Judge Gettleman granted, the same relief that the first assistant executive director said they could do. Director Johnsen said, they have a chair at the base of the

ramp. They could easily push somebody up and down.

If the person said, just like in the Lacy case, I can wheel myself up and down the ramp on my own, fine. But barring that, they ought to push -- they ought to provide a wheelchair and assist them up and down the ramp. The reason being, everybody acknowledges that the ramp doesn't comply with the ADA. That's a common -- common issue.

Second issue, do they have to provide an accommodation? They say no. We say obviously that they have to provide an accommodation. And otherwise, just like Mr. Polletta, they experience pain. We have a year and a half of people literally clinging to the wall to go up and down the ramp.

THE COURT: But you must also have people that use canes that can go up the ramp pretty readily.

MR. T. MORRISSEY: That's correct.

THE COURT: Right?

And they would be part of the class too. Why should they be part of the class -- or people with crutches, so let's say temporarily for crutches, that they can go up, down the ramp readily without any pain, without any -- you know, without any hinderance.

Why should they be part of this class?

MR. T. MORRISSEY: Because alluding to the Lacy decision, Judge Gettleman, there was no question that some

people in wheelchairs -- even more clearly, person in wheelchair probably won't fall. It might be a little stressful. Might be -- take a lot of energy to wheel up and down. But the likelihood that they are going to injure themselves is remote.

THE COURT: But --

MR. T. MORRISSEY: Judge Gettleman --

THE COURT: Mr. Morrissey, in Lacy, though, everyone there, the class comprised of people in wheelchairs, right? So everyone -- so there is that cohesiveness to the class. They basically can't walk at all. And so they're in wheelchairs.

And whether or not they can kind of go up the ramp or not and the ramp is not ADA compliant, I think everyone admits that. And so when it comes to -- so the differences between class members in that class seems to be much -- for the purposes of using the ramp, seems to be much less of a degree than the differences amongst the class that you are proposing, which consists of people that have canes or walkers or crutches, even crutches temporarily.

And so that's what really kind of gives me pause is that the class that you are requesting seems so overly broad and would include all these types of people with different abilities, with different, you know, impairments or levels of impairments.

And so is there enough cohesion in the class that you

are seeking?

MR. T. MORRISSEY: There is. The cohesion is, they've had a diagnosis by a medical person on intake at the jail, or during the course of their incarceration, that they have a mobility limitation. Without that, your Honor, nobody is prescribed a cane, crutch or walker.

Now that it's determined, your Honor, that they need to have these devices in order to ambulate. And otherwise, you know, obviously the ADA covers people that are -- use walkers, canes and crutches. And what the Court is really looking at -- and it's the same discussion we just had, under a (b)(3) scenario, some may not -- some may fail because they weren't injured, correct?

But in a case of a (b)(2), it's a common general question. The common general question is, does the sheriff have to provide an accommodation?

At this stage, from the record in this case, it's clear that nobody has received an accommodation. We provided the transcript of Director Johnsen. He stated in his deposition that he's not aware -- and he was in charge of that ramp in his prior position. He's not aware of anybody that's been assisted up and down the ramp.

THE COURT: But what percentage of the people in your class require or need the accommodation to go up and down that ramp, right? And so I understand the Pella case. There is

also -- so the Pella case is where Judge Posner said that any class will undoubtedly have people who haven't been injured, right?

But he also wrote -- and I have to get this case. He also wrote in another case, I don't think it's Mullins, but he wrote in another case, this is the same Judge Posner, that a class cannot have a substantial amount of people who have no injury, right? So somewhere between -- you have to be somewhere in between some but not substantially amount.

And so the -- so I as a District Judge kind of read those cases. And I say, okay, well, how am I supposed to apply these? And it seems to me that if there are a substantial amount of people that use canes or walkers or crutches that don't require assistance, then this class just simply isn't certifiable.

MR. T. MORRISSEY: Well, you are looking at obviously the Jamie versus Milwaukee case.

THE COURT: It's not --

MR. T. MORRISSEY: There wasn't a diagnosis.

THE COURT: It's not Jamie because Judge Sykes wrote that one. I'll come up with the name at some point.

MR. T. MORRISSEY: It can probably be addressed by definition. When we were on appeal in front of the Seventh Circuit on the Lacy case, which hasn't come down yet, one of the judges said, is a person supposed to hope that some

benevolent guard will push you up and down the ramp?

And that's the same thing we are facing here. This could be cured with a definition. Somebody that -- there is a confrontational barrier. They have a right to benefit from the ability to go to court in the same way as a person that has no mobility impairment. They have this barrier that causes, I would say, majority of the people, because they've been determined to have a mobility disability, to scale that ramp in order to preserve their constitutional right to go to a criminal hearing.

Does each person that requires assistance have to file their own lawsuit when this can be addressed under (b)(2) in a ruling, whether favorable or unfavorable, that the jail does or does not have to accommodate people that are on walkers, crutches or canes? I don't think so. And I think that it can be easily addressed under (b)(2).

The issue of (b)(3) obviously would depend upon causation and damages. Some people will have none. But I think really the sheriff -- and I think you have to look at the feasibility of the remedy here and -- and the rationale of the sheriff in not providing the same relief to a person on a walker as they do for a person on a wheelchair.

The reason why Johnsen said, we don't do it, is because the Judge hasn't told us we have to do it. So unless a Court tells them they have to -- they have to provide an

accommodation, the sheriff is very content with allowing on a daily basis -- and we're talking about hundreds and hundreds of people scaling that ramp, which I suggest causes pain and suffering and potential of injury to a majority of the people.

And I don't know -- you know, I understand you're saying there are some people that perhaps are fakers --

THE COURT: No, no. I am not saying that at all. I am saying -- I'm not saying that there are some people that are fakers.

What I'm saying is that there are undoubtedly people who require canes to ambulate through the jail but who could make their way up the ramp without assistance, that don't need assistance to get up the ramp. You know, and there are probably people with crutches, because just because you have a crutch, you need a crutch to walk around, doesn't mean that you need anything more than a crutch to go up a ramp.

And so what I am -- whereas if you are -- so that's what I am saying. I am not saying that they are fakers at all. I am saying that your class definition is anyone who has been prescribed to use a crutch, walker or cane to attend court. And what I am saying is that it seems to me that there are a lot of people within that class that might not need any assistance to do that.

And isn't it plaintiff's burden to show me that there is a class of people that -- you know, that is a cohesive class

that would meet the requirements of Rule 23?

MR. T. MORRISSEY: Well, I mean, if we defined it to include just people that needed assistance. And as far as evidence, we have provided the Court with some videotapes of people going up and down the ramps. We should have them from last April of 2017 to the present.

As far as a (b)(2), I don't think it's an issue. (b)(3) is something that can be dealt with separately. If we see -- you know, if the Court was to rule on summary judgment under (b)(3) that they violated providing an accommodation for those that need it, and we saw on the video that Joe Jones was running up the ramp with a cane, well, I mean, we could deal with that at that time.

But as far as a (b)(2), there is a common question. Common question is whether or not they have to provide an accommodation, accommodation to those folks that request or need an accommodation to go up and down the ramp. Perhaps we could redefine it to say that because --

THE COURT: I think you have to -- I think at a minimum you have to redefine it to say, it's those people that, you know, are prescribed those various aids who need assistance to traverse the ramp, or to go up and down the ramp.

Even under (b)(2) I think you need to do that because you are also looking at typicality problems. And if you have -- even for commonality. If you have a bunch of people in

that putative class who don't need that assistance, then one wonders whether you even satisfy commonality.

MR. T. MORRISSEY: Well, in that case I think -- well, I think clearly that Mr. Polletta is a -- his claim is typical of the people that need assistance. He had a fractured, shattered ankle. And he was initially in a walker -- in a wheelchair. And then he transitioned to a walker, and then finally to a cane.

But his claim is that he needed assistance because of the shattered, and that going down the ramp was excruciatingly painful for him because of the shattered ankle.

So I think that he's certainly adequate, and his claim is typical of people that need assistance. And that can be addressed in one ruling. Whether or not they have -- for those that need assistance, whether or not the sheriff does or does not have to accommodate them. And I would -- you know, and depending upon that ruling, we can then deal with the issue of damage.

But I think -- I think the definition can be refined, your Honor. I understand what the Court is addressing. Judge Gettleman felt otherwise about the definition, because there the definition was all people that are in wheelchairs that go to court, not just Leighton but throughout the court system. And he addressed both in his preliminary injunction hearing and in his class certification issues of whether or not certain

putative class reps actually had any problem using a toilet or going up and down. Because the defense argued very strongly in Lacy that these folks really had no problem going up and down the ramp.

But it's a broader issue. It's much broader than an individual. It involves the overall general policy that we don't have to provide an accommodation. And I think that Mr. Polletta is both typical and adequate to represent those folks. And it can be dealt with, I think.

THE COURT: Thank you, Mr. Morrissey.

MS. SANCHEZ: Your Honor, I think I agree with your Honor that the class definition at this time is overly broad. And the common -- I think the plaintiff -- we use the term accommodation very loosely during this oral argument. But I think the plaintiff made it very clear, the accommodation they are seeking for the class is wheelchair. And -- but that's not part of their definition.

And so just we have the record clear, the deposition transcript of Chief Johnsen in the Hacker case was not part of the brief for the class certification. It was later filed during the motion for reconsideration. And I think plaintiff's counsel misstates the testimony given by Johnsen.

Johnsen's testimony is more in line with your Honor's reasoning; that is, yes, we have a wheelchair there. And the -- it's there, but the inmate has to request it because we

don't -- not everybody would need it.

And the -- your Honor's question on how many, the percentage of inmates with crutches or walker or cane actually is material to this determination because we -- the class certification requires common facts and common law, or common issues, to be predominating over individual needs and the facts surrounding the individuals' disability.

And in terms of the -- I think the percentage actually goes to the issue as to the predominance. And let's say if there is only a few detainees that will actually require a wheelchair to go up and down, do we have a class case? Or can it be resolved through individual litigation? Would it make more sense? And --

THE COURT: Usually, though, those situations like that, like here, I think present definitional problems with the class.

MS. SANCHEZ: Yes, it could be defined, but now the classification -- or the definition is overly broad and doesn't address the individual medical conditions and the duration and the mobility issue. And it's -- it's improper at this stage to give the classification.

MS. SCHELLER: Your Honor, if I may add the medical perspective to that. Plaintiff's counsel argued that the ADA certainly applies to persons with canes, crutches and walkers. And while that can be true, it is not necessarily true.

I mean, the law under the ADA is that it is meant to apply to persons with real disabilities, not to every individual so as to cheapen the ADA.

For example, if I were to hurt myself playing basketball, my ankle, I may for a finite period of time require an ambulatory aid. That does not mean I would qualify to recover under the ADA if there was some type of violation within the jail. So I'd like to just start from that point.

Now, with regard to Mr. Polletta, whether or not his injury qualifies as a disability is not really the argument that we are having today. But I would just like to point out that I think that plaintiff's assertion of the rights under the ADA was a bit more broad than is actually covered.

The next piece I would like to point out is that these ambulatory aids that are giving rise to plaintiff's proposed class definition are accommodations under the ADA. That's what they are. And to the extent that those ambulatory devices are insufficient for any individual detainee, it is incumbent then upon the detainee to request an additional accommodation. It is not the place for medical providers or for anyone else to impose accommodations upon persons with disabilities. And I think --

THE COURT: But isn't that what they are doing? They are saying, so if you -- if I am someone who uses a walker, is prescribed to use a walker, and I have a hearing at Leighton,

and I go there and I look at that ramp. And, you know, I just think that I think I need some assistance.

And so shouldn't there be some of way right then and there that I can ask for assistance and the assistance be given to me?

MS. SCHELLER: I believe that that is accurate, your Honor. I don't believe that plaintiffs can prove that that is not happening. And I also don't believe that they can prove it on a scale so numerous as to warrant class certification, or an experience so common as to warrant class certification.

So the first premise is correct. I don't believe that plaintiffs have met their burden of showing any of these things. Certainly there are many people who use the ramp with ambulatory aids that are unassisted. Whether all of them would like assistance has not been proven. Whether any of them would like assistance is not in the record, outside of Mr. Polletta.

So, you know, I think that we find ourselves once again in the position where plaintiffs are supplementing briefs after things are done and, you know, talking about additional people, additional clients.

But the strictures of Rule 23 are pretty clear. When a plaintiff filed for motion for class certification, they are signaling to the Court and to everyone else, they have all the discovery that is needed, and they are prepared to ask for certification of the class.

And when we have back end of things coming from all sides, it's really quite prejudicial and unfair. So I would just point that out.

And then the final point that I wanted to join Ms. Sanchez in making is that we haven't heard of numerous common fact patterns of persons, identifiable persons, potential class members, who are using these ambulatory aids, requesting assistance up the ramp and being denied. We just have not been provided with any number of persons. We haven't been provided with their identities.

THE COURT: But aren't there videos of people that clearly are having some difficulty navigating that ramp?

MS. SCHELLER: Yes, your Honor. And I'll provide a counter example to that. My grandfather was a double amputee. And he had a golf cart with an attachment on it, and he would buckle himself in. And he was allowed to drive it up to the tee box. And he was terrible, and he would fall down from time to time. He did not want any additional assistance.

And I don't think we can look at videos and determine what that person's individual desire was for additional assistance. If the plaintiffs can procure actual people -- and by procure I mean before they filed the class certification brief months ago -- actual, identifiable person who had ambulatory aids and requested additional assistance, we would be having a different conversation.

But I think they have fundamentally failed in their burden. And we are once again on the back end, you know, trying to fend off all of these sort of ancillary side anecdotes.

THE COURT: Okay. Thank you. Mr. --

MR. T. MORRISSEY: May I address that, your Honor?

THE COURT: No need at this time, Mr. Morrissey. Thank you.

So, Mr. Morrissey, and I am addressing this to the junior Mr. Morrissey, I am going to add to your work, Mr. Morrissey, because I do think that the class definition as currently stated in the motion is overly broad. And so I am going to deny the motion for class certification without prejudice.

But again on the same -- and I do think defendant has a point that to the extent that there are additional things in the record that would support plaintiff's revised definition, that they are entitled to have it up front. And I would like to see it all.

And so if it's within the realm of practical possibility and your family obligations, Mr. Morrissey, I would like Mr. Polletta to file a renewed motion for class certification along the same schedule. Is that doable?

MR. P. MORRISSEY: That's fine, your Honor.

THE COURT: Is that doable for defendants?

MS. SANCHEZ: Yes, your Honor.

MS. SCHELLER: Without seeing the motion, I am somewhat reticent to agree to the same schedule. But I presume the Court would entertain a motion for extension of time if necessary?

THE COURT: Yes, if necessary.

So I will go ahead and set the same briefing schedule for a renewed motion for class certification in the Polletta case. All right?

So I want to thank counsel for spending time with me this afternoon and exploring some of these issues. I think it was very helpful to me actually. And at this point, unless there is anything else that I can address, I look forward to seeing the briefing on the renewed motions.

MS. SCHELLER: Your Honor, may we bring up one housekeeping matter on Hacker?

THE COURT: Yes.

MS. SCHELLER: At least on behalf of the Cook County defendants, I wonder if the Court would entertain a Rule 56 motion in conjunction with this briefing schedule?

THE COURT: I will not at this time. Okay? Let's deal with class certification first.

Mr. Morrissey, when was Lacy argued?

MR. P. MORRISSEY: April 19.

THE COURT: April 19. Who is on the panel?

MR. P. MORRISSEY: Judge Ripple, Judge Manion, Judge Kanne.

THE COURT: Okay. All right. Very good. Thank you very much.

MR. T. MORRISSEY: Thank you. Have a nice weekend, your Honor. Thanks for the time, too, your Honor. I think it was helpful.

THE COURT: It was very helpful. Thank you.

(Which were all the proceedings heard in this case.)

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a true, correct and complete transcript of the proceedings had at the hearing of the aforementioned cause on the day and date hereof.

/s/Alexandra Roth _____ 7/11/2018

Official Court Reporter
U.S. District Court
Northern District of Illinois
Eastern Division

Date